Supreme Court, U.S.
FILED
FEB 9 1994

No. 93-405

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DIGITAL EQUIPMENT CORPORATION,
Petitioner,
v.
DESKTOP DIRECT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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Desktop and Digital approach the question presented in fundamentally different ways.[1] Desktop begins by arguing that appeals under the collateral order doctrine are not "final within the meaning of Section 1291," Resp. Br. 8, and then proceeds to advocate a number of limitations on the doctrine that do not purport to rest in any way on Section 1291. Thus, Desktop urges that only claims based on explicit statutory or constitutional provisions, or (presumably alternatively) only claims regarded by the courts as "important enough" in some broad pub-

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* Petitioner's Rule 29.1 statement appears at Pet. ii.

[1] There is some common ground. Desktop does not dispute that the district court decision reinstating this case conclusively resolved the disputed question and that the question was completely separate from the merits. *See* Pet. Br. 11 & nn.4 & 5. Desktop had challenged both propositions below, but has abandoned those arguments before this Court.

lic ~~policy sense, s~~should be appealable under the collateral order doctrine. These may or may not be good ideas about how to draft a jurisdictional provision, but Desktop neither can nor does claim that they are rooted in the statutory provision this Court is called upon to construe.

Our approach is different. We start with the recognition that the question presented is at bottom—as this Court has consistently reiterated—a construction of Section 1291. *See* Pet. Br. 6, 28-30 (citing cases). In our view, that recognition imposes certain limits on the Court in applying the collateral order doctrine. The Court is not free judicially to craft the best or even a better test for appealability—one limited, for example, to claims based on explicit statutory or constitutional provisions, or claims regarded on an ad hoc basis as "important enough" in some broad public policy sense. Instead the test the Court applies must be grounded in the statute and the only criterion Congress wrote into the statute—finality. Whether the source of a right to avoid trial is found in the Constitution, a federal statute, a state statute, a rule, or common law has nothing whatever to do with how "final" a denial of that right may be under Section 1291, and therefore a test that focuses on the source of the right has no basis in Section 1291—the provision the Court is construing. The same is true with respect to a test drawing the appealability line on the basis of the importance of the right as a matter of public policy. Such approaches are no more legitimate than if the Court simply announced an amount in controversy threshold for appeals under the collateral order doctrine.

Desktop argues that this Court has already adopted its approach—one or the other of them, at different times—but Desktop is wrong. Make no mistake—this Court (1) has *never* denied appealability under *Cohen* because the right at issue was not based on an explicit statutory or constitutional provision, and (2) has *never* denied

appealability because it did not view the right at issue as "important enough." We made these same unqualified assertions in our opening brief, Pet. Br. 32, 36, and Desktop has come up with nothing to challenge them. What this Court *has* done is focus on whether the underlying right is in fact a right to avoid trial—that is the "critical question," *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 524 (1988), and "the heart of the issue." *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985).

I. THE SOURCE OF A RIGHT NOT TO BE TRIED IS IRRELEVANT TO THE FINALITY AND APPEALABILITY OF A DENIAL OF THAT RIGHT UNDER SECTION 1291 AND THE COLLATERAL ORDER DOCTRINE

There is no disputing that one sentence from this Court's opinion in *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794 (1989), supports Desktop's contention that the right to avoid trial triggering appealability under *Cohen* is a right based on an explicit statutory or constitutional provision. That is what the sentence says. By the same token, however, there can be no dispute that this sentence—repeated like a mantra throughout Desktop's brief—is not the holding of *Midland Asphalt* but instead dicta,[2] is not correct descriptively (as both Desktop in its brief (at 33) and the court below (at Pet. App. 8a) acknowledge), has (properly) not deterred at least five other Circuits from finding *Cohen* applicable in the absence of an explicit statutory or constitutional source for the claimed right, and finds no support in the concerns of finality underlying Section 1291 and the "practical construction" of that provision in *Cohen* and its progeny.

The decision in *Midland Asphalt* was based on this Court's conclusion that the explicit provision at issue

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[2] *See United States* v. *Dixon*, 113 S. Ct. 2849, 2861 (1993) ("Quoting that suspect dictum multiple times * * * cannot convert it into caselaw").

there—Federal Rule of Criminal Procedure 6(e)(2)—was not a guarantee that trial will not occur. *See, e.g.*, 489 U.S. at 802 ("The text of Rule 6(e) contains no hint that a governmental violation of its prescriptions gives rise to a right not to stand trial"). The Court at no point based its analysis on the *source* of the right asserted under Rule 6(e), but instead based its analysis on the *nature* of that right.

In fact, as we pointed out in our opening brief, Pet. Br. 36, this Court has never held the *Cohen* doctrine inapplicable because of the source of the asserted right not to be tried. In particular, the Court did not adopt such an approach in *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. 495 (1989), decided less than two months after *Midland Asphalt*. The asserted right not to be tried at issue in *Lauro Lines* rested on a private contract, but this Court did not dispose of the case by relying on the dictum from the then-recent *Midland Asphalt* opinion that Desktop finds so dispositive here. Instead, as it did in *Midland Asphalt* itself, the Court analyzed the nature of the right at issue, and concluded that it was not a guarantee that trial would not occur. *See* 490 U.S. at 501.

Nor can Desktop reconcile this Court's decisions in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), and *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), with its insistence that *Cohen* applies only to an "explicit statutory or constitutional guarantee" that trial will not occur. The Court in *Midland Asphalt* cited two examples of such explicit guarantees—the Double Jeopardy Clause and the Speech or Debate Clause—but the right to avoid trial based on official immunity recognized in *Mitchell* and *Fitzgerald* is in no sense based on any such explicit guarantee. There is no "Official Immunity Clause" in the Constitution. Indeed, the most that Desktop can argue is that the immunity right "has been created *as a matter of public policy*" with "roots" in the Constitution. Resp. Br. 16 (emphasis added). In fact, as noted in our opening

brief, Pet. Br. 35, this Court has fixed the source of the immunity doctrines in common law—the same source underlying Digital's right not to be tried pursuant to its contract with Desktop. Desktop concedes as much when it contends in a complete *non-sequitur* that "where there is a 'statutory or constitutional guarantee' *or a settled common-law right of equal weight*, the 'importance' inquiry is satisfied by the dignity and consequence that Congress and the Framers accorded to that particular right or interest." Resp. Br. 33 (emphasis added).

Other courts have recognized—*after Midland Asphalt*—that *Cohen* applies in the absence of an explicit statutory or constitutional source for the claimed right. The three Circuits that issued rulings in conflict with the decision below so held,[3] as have the Fourth[4] and Ninth Circuits.[5] Even the Tenth Circuit below recognized that this Court has found appealability under *Cohen* "in the absence of a constitutional or statutory guarantee." Pet. App. 8a. Most significantly, Desktop does not even attempt to explain how the source of the right not to be tried is at all related to the finality concerns underlying Section 1291 and the judicial construction of that provision embodied in the *Cohen* doctrine. *See* Pet. Br. 34-37.[6]

The main justification Desktop advances for the jurisdictional statute it would like to see this Court enact is that the collateral order doctrine should be carefully

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[3] *Janneh* v. *GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990); *Grillet* v. *Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991); *Forbus* v. *Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S.Ct. 412 (1992).

[4] *See James* v. *Jacobson*, 6 F.3d 233 (4th Cir. 1993).

[5] *See, e.g., Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991) (discussed at Pet. Br. 35 n.17); *Jackson* v. *Vasquez*, 1 F.3d 885 (9th Cir. 1993).

[6] Thus, Desktop does not explain why this purported limitation on the collateral order doctrine never appears in the standard articulation of the *Cohen* test. *See, e.g., Lauro Lines*, 490 U.S. at 498.

circumscribed to narrow the situations in which an appeal can be taken prior to the end of trial. We agree. The way this Court has pursued that objective, however, has been by focusing on "the precise contours of the right asserted," *Lauro Lines*, 490 U.S. at 501, and insisting in rigorous terms that the right be in fact a right not to be tried, rather than by imposing, *deus ex machina*, artificial limitations based on the particular source of the right or the perceived importance of the right as a matter of public policy. Only by avoiding such careful inquiry into the question whether a right not to be tried is indeed at issue is Desktop able to assert that certain defenses—based on statutes of limitations and jurisdictional defects—will cause a flood of *Cohen* appeals if Digital prevails. Resp. Br. 19.

Thus, although Desktop claims that statutes of limitations "could" be said to confer a right not to go to trial, the very cases cited by Desktop—each arising in the criminal context [7]—establish that they do not. *See United States* v. *Weiss*, 7 F.3d 1088, 1090 (2d Cir. 1993) ("The three courts of appeals that have considered this question * * * have all concluded that the statute [18 U.S.C. § 3282] does not guarantee a 'right not to be tried' and that denials of motions to dismiss indictments on statute-of-limitations grounds are, therefore, not immediately appealable").

The conclusion that " 'the limitations statute * * * creates a safeguard against unfair convictions arising from delinquent prosecutions but does not entail a right to be free from trial,' " *United States* v. *Rossman*, 940 F.2d 535, 536 (9th Cir. 1991) (quoting *United States* v.

[7] *See* Pet. Br. 18 n.9. Desktop cites only one civil case—*Broan Mfg. Co.* v. *Associated Distribs., Inc.*, 932 F.2d 1146 (6th Cir. 1991), *see* Resp. Br. 19—but the citation leaves us at a loss. Neither that opinion nor the court's prior opinion in the case, 923 F.2d 1232 (6th Cir. 1991), involved a statute of limitations defense or a collateral appeal. The case has no apparent relevance either to Desktop's argument or any other issue before this Court.

Levine, 658 F.2d 113, 126 (3d Cir. 1981)), is grounded in an understanding of the interests served by statutes of limitations. As the Third Circuit explained in its extensive examination of the issue in *Levine*:

> Limitations statutes * * * are intended to foreclose the potential for *inaccuracy* and *unfairness* that stale evidence and dull memories may occasion in an unduly delayed trial. They provide relief from extended pretrial anxieties and, by encouraging investigation of recent crimes, contribute to a rational allocation of prosecutorial resources. * * * [I]t is primarily concerns of prosecutorial fairness and promptness, *in contradistinction to insulation from repeated trials*, that underlie limitations statutes. [658 F.2d at 127 (second emphasis added).]

In light of the purposes served by statutes of limitations, the rights vindicated by these statutes are more akin to speedy trial rights, for which immediate appeal is not available under *United States* v. *McDonald*, 435 U.S. 850 (1978), than to the rights not to be tried established by the Double Jeopardy and Speech or Debate Clauses. As the *Levine* court explained, "whereas the Double Jeopardy and Speech and Debate Clauses bar the sovereign from prosecuting at all, the Speedy Trial Clause and statutes of limitations do not insulate the defendant from trial *per se*. Rather, the latter two sources of protection concede that the accused is subject to prosecution and proceed to define the permissible bounds on the timeliness of prosecution." 658 F.2d at 120. *Accord United States* v. *Davis*, 873 F.2d 900, 909 (6th Cir.), *cert. denied*, 493 U.S. 923 (1989).

Even if statutes of limitations could be said to involve rights not to go to trial, other aspects of the *Cohen* doctrine would preclude collateral appeals from denials of limitations defenses. District court decisions on such defenses "often do not conclusively determine the disputed question" because, for example, "the exact dates of con-

tinuing violations, conspiracies, or statutory tolling justified by flight from the jurisdiction, can often be properly evaluated only after development of the evidence at trial enables an accurate assessment of timeliness." *Levine*, 658 F.2d at 129, 121. In addition, "denials of motions to dismiss on statute of limitations grounds would not generally satisfy the second *Cohen* criterion" because "limitations defenses often intersect with matters that develop at trial." *Id.* at 123-124.

Similarly unavailing is Desktop's assertion that defenses based on lack of jurisdiction will flow through the "floodgates" of the collateral order doctrine if Digital prevails. Desktop claims that these defenses "appear[] to confer a right not to stand trial *before that court*." Resp. Br. 19 (emphasis added). This submission, however, continues the Tenth Circuit's surprising error in failing to recognize a key distinction drawn by this Court. As the Court has recognized, a right not to stand trial *before a particular forum* "is different in kind" from the type of claim Digital has brought here—a right "to avoid suit altogether." *Lauro Lines*, 490 U.S. at 501. The former is "adequately vindicable" after trial, *id.*; the latter is not, and is therefore immediately appealable under the *Cohen* doctrine.[8]

[8] Desktop's reliance on this Court's statement in *Catlin* v. *United States*, 324 U.S. 229, 236 (1945), that motions to dismiss are not immediately appealable, Resp. Br. 20, is a red herring. No one is suggesting that motions to dismiss are universally appealable. The question is whether the essence of the right to be vindicated by the motion is a right not to be tried. Where that is so, denials of motions to dismiss *are* immediately appealable. *See, e.g., Figueroa* v. *United States*, 7 F.3d 1405, 1408 (9th Cir. 1993) (although "[o]rdinarily denial of a 12(b)(6) motion is not a reviewable final order, * * * when a question of immunity is involved * * * we use the collateral order doctrine to exercise jurisdiction").

II. THE TENTH CIRCUIT MISAPPLIED THIS COURT'S PRECEDENTS IN RULING THAT AGREEMENTS TO TERMINATE LITIGATION WERE NOT "IMPORTANT ENOUGH" TO JUSTIFY APPEAL UNDER *COHEN* OF ORDERS REFUSING TO ENFORCE SUCH AGREEMENTS

Desktop devotes only two pages of its brief to defending the Tenth Circuit's conclusion that the enforceability of settlement agreements is not "important enough" to support appeal under the collateral order doctrine. Resp. Br. 33-34. In fact, Desktop's basic point in that cursory discussion is a reiteration of its previous point that the right sought to be vindicated must have its source in an explicit statutory or constitutional guarantee. *See id.* at 33.

We explained in our opening brief why the enforceability of agreements to terminate litigation was important enough as a matter of public policy to support appeal under *Cohen* before holding the very trial terminated by the agreement. *See* Pet. Br. 21-28. Nothing in Desktop's submission undermines that showing. In particular, we noted the critical role such agreements play in the functioning of the federal justice system. The repose ordinarily secured by settlements relieves tremendous pressure on judicial dockets and achieves significant gains for the parties. The risk of upsetting that repose is heightened, however, if parties considering an effort to undo the agreement (such as a plaintiff who comes to believe that it should have gotten more money) know that an initial decision in their favor may not be reviewed immediately but rather will restore the leverage they previously compromised away. Permitting interlocutory appeal of decisions setting aside such agreements and reinstating litigation serves the interests in efficient resolution of disputes underlying Section 1291.

At the same time, we also noted in our brief that nothing in this Court's precedents invited such a broad public

policy debate in applying the collateral order doctrine. On that point, Desktop zealously attacks a straw man of its own creation when it criticizes Digital for advocating rejection of the "importance" requirement and the overruling of "a dozen cases applying the *Cohen* factors over the past 40-plus years." Resp. Br. 29. We need not and do not do any such thing. Our point is that the Tenth Circuit's understanding of the "importance" inquiry went far afield from anything this Court had ever done under *Cohen*. That is what we said in our opening brief, *see* Pet. Br. 8 ("the Court has never viewed 'importance' in the broad public policy sense embraced by the Tenth Circuit"), and Desktop has no rejoinder to our flat assertion that the Court has never once in 45 years denied appealability under *Cohen*—as the Tenth Circuit did here—because of a conclusion that the underlying right to avoid trial was not "important enough." *See* Pet. Br. 32 & n.15 (citing cases making same point). This confirms that importance in the sense understood by the Tenth Circuit has not been an element of the *Cohen* test. A recognition of that fact hardly requires "overruling" any of this Court's precedents.[9]

[9] Desktop suggests in passing that Digital's argument concerning the scope of the importance element of the *Cohen* test has been waived because it was not presented to the district court or the court of appeals. *See* Resp. Br. 27 n.30. Desktop is wrong. First, there was of course no occasion to present *any* argument on appealability to the district court; the issue by definition only arises on appeal. Second, Digital indisputably argued before the Tenth Circuit below that the enforceability of agreements to terminate litigation met any "importance" requirement under *Cohen*, *see, e.g.*, Appellant's Memorandum Brief in Support of Jurisdiction, at 9-10; the lower court's decision—applying such a requirement in a way this Court never has—highlighted the logically antecedent question of the scope of the requirement for the first time. Third, each of the cases cited by Desktop involved an effort to raise a new "question presented" for the first time in this Court. That is not the issue here; the only question presented remains the one litigated before the court of appeals and posed in Digital's petition—whether the collateral order doctrine applies in this case.

Desktop attempts to make its point about "importance" by selectively citing only those collateral order cases that happened to involve claims that would generally be regarded as important. *See, e.g.*, Resp. Br. 29 (citing double jeopardy, speech or debate, and official immunity cases). Desktop simply ignores the various other situations in which this Court has upheld appeal under *Cohen* where the rights at issue do not remotely rise to the same level, including *Cohen* itself (right under state law to have plaintiff post bond), *Swift & Co.* v. *Compania Colombiana del Caribe*, 339 U.S. 684 (1950) (attachment rights under admiralty practice), *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964) (restricting suit to Jones Act claims), and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (order allocating costs in class action). And of course Desktop cannot look to any analysis of "importance" in these cases to explain the results, because this Court has not analyzed the issue of appealability under the collateral order doctrine—whether upholding or denying appealability—in terms of importance.[10]

Desktop's response to our contention that it is inappropriate for federal courts to decide whether jurisdiction exists under 28 U.S.C. § 1291 based on their view of the public policy "importance" of the issue simply highlights the seriousness of the problem. Desktop notes that courts frequently assess importance in establishing jurisdiction, citing this Court's certiorari practice and the practice of the courts of appeals in weighing suggestions for *en banc* consideration. Resp. Br. 30. The critical and dispositive distinction, of course, is that litigants have no right to *en banc* review or review on certiorari. *See, e.g.*, S. Ct.

[10] One reason for this is the indeterminacy of such a broad inquiry. *See* Pet. Br. 32-33; *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14 (1941) (rejecting argument that distinction between substance and procedure should turn on "importance" of affected rights, observing that "[i]f we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded").

Rule 10.1 ("A review on writ of certiorari is not a matter of right, but of judicial discretion"). In contrast, an appeal under the *Cohen* doctrine is an appeal as of right. It is one thing for the courts to apply their own notions of importance when expressly directed to do so, and quite another to do so when construing a statute that grants an appeal as of right and does not purport to confer on the judiciary the authority to limit appealability based on importance (as opposed to finality).

III. DIGITAL'S RIGHT IS THE RIGHT TO AVOID TRIAL

A. Looking ahead to the merits, Desktop contends that Digital's claim cannot be characterized as a right not to be tried because the Settlement Agreement conferring that right was procured by fraud. Desktop premises this entire argument on the assertion that "the district court obviously found fraud," Resp. Br. 32 n.37, weaving its view of disputed facts into its Question Presented and its Statement of the Case and asserting its conclusion repeatedly in its argument. *See, e.g.*, Resp. Br. 8, 11, 17, 21, 22, 23, 24, 32. The premise is both utterly false and beside the point.

If anything is clear from the district court's decision, it is that the court did *not* find fraud. The district court said only "that a fact finder *could* determine that defendant failed to disclose material facts to plaintiff during settlement negotiations which would have resulted in rejection of the settlement offer by the plaintiff." Pet. App. 13a (emphasis added). It did not itself make such a finding. The district court then rescinded the Settlement Agreement and reinstated the litigation—conclusively deciding the disputed question, *see* Pet. Br. 11 n.4—on the basis of this plainly erroneous legal standard. *Id.* at 27-28.

Desktop attempts to support its erroneous premise that the district court "obviously" found fraud by citation to general principles enunciated in 9 C. Wright & A. Miller,

Federal Practice and Procedure § 2579, at 712-713. Thus, it claims, "[i]f a district court does not make a specific finding on a particular fact, the reviewing court may assume that the trial court impliedly made a finding consistent with its general holding if such a finding is supported by the evidence." Resp. Br. 32 n.37. There is no need to quibble with the principle; it has no application here. The district court did not simply fail to make express a finding that was implicit in its opinion; it rather plainly made clear that its decision to reopen the case was based on what a finder of fact *might* conclude. That is not a gap in findings of fact that may be filled by an appellate court; it is an error in the applicable legal *standard*.[11]

Far more perplexing, however, is the question why Desktop thinks it matters whether the district court found that the Settlement Agreement was procured by fraud. Desktop seems to believe that if it is ultimately entitled to prevail on the merits, no appeal is necessary. But the very purpose of the appeal is to determine the propriety of the district court's decision. It is for this reason that the Court, in determining whether or not to permit collateral appeals, has evaluated the nature of the right sought to be vindicated and not the merits of the particular claim. Of course it is true that some settlement agreements will be procured by fraud, and that decisions to upset them should be affirmed, just as it is true that

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[11] As noted in *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 290-292 (1988) (Scalia, J., concurring), some courts and judges have suggested that appeal under the collateral order doctrine should not be available when the claimed error concerns alleged abuse of discretion. For the reasons noted, Digital's contention on appeal involves a question of law—whether the district court applied the correct legal standard when it overturned the Settlement Agreement and reinstated the litigation because "a fact finder could determine that defendant failed to disclose material facts to plaintiff during settlement negotiations which would have resulted in rejection of the settlement offer by the plaintiff." Pet. App. 13a.

some denials of the qualified immunity or double jeopardy defenses will be correct and should be affirmed so that trial may proceed. The important question for purposes of decision here is whether that determination should be made before the trial occurs; where, as here, the appellant seeks to vindicate a right not to be tried, this Court has recognized that the determination must take place before trial if it is to take place at all. The question whether the appellant will ultimately prevail is simply irrelevant to the issue of appealability.[12]

B. Desktop argues that the right not to face trial was not an "essential aspect" of the Settlement Agreement because the Agreement also served other purposes, such as securing for Digital the use of the disputed trademark and a limit on its liability to respondent. Resp. Br. 37-38. This argument is contrary not only to the terms of the Settlement Agreement and common practice when entering such agreements, but also to this Court's decisions.

As we have explained, the right to avoid trial was an express and essential element of the Settlement Agree-

[12] See *United States* v. *Wood*, 950 F.2d 638, 641-642 (10th Cir. 1991) ("The crux of the government's argument is that we do not have appellate jurisdiction because defendant has not raised a colorable double jeopardy claim. The government's argument confuses our jurisdictional authority to hear an appeal with our supervisory power summarily to dismiss frivolous claims. Every district court order denying a double jeopardy claim is, by its nature, a final decision due to the collateral order doctrine. The summary determination of whether a defendant has raised a colorable claim is not necessary to our jurisdiction").

In any event, as even respondent notes, settlement agreements may be set aside only in extraordinary circumstances. Resp. Br. 25. Appeals from such extraordinary decisions of the district courts are not likely, as a class, to be frivolous. Indeed, in two of the three court of appeals decisions upholding appealability under the collateral order doctrine of orders refusing to enforce agreements not to litigate, the appellate court overturned the district court decision after reaching the merits. *See Janneh* v. *GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990); *Grillet* v. *Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991).

ment between the parties. Pet. Br. 13-14 & n.7. Indeed, the agreement itself established the relative values of the rights it secured; Digital paid a specified amount for acquisition of the trademark and fifteen times that amount "for the dismissal of the * * * lawsuit and a waiver of all damages * * *." J.A. II at 4.[13] Payment of the funds by Digital was expressly conditioned on notification that the suit had been dismissed, with prejudice to any claim Desktop may have had to bring future actions. *Id.* Such termination of litigation was obviously of high value to Digital, and was an "essential aspect" of the Settlement Agreement.

This Court's cases have not demanded—as Desktop implicitly does—that the right to avoid trial be the *only* interest at issue for there to be review under the collateral order doctrine. Rather, the cases reflect the reality that, where it exists, the right to avoid trial necessarily secures the right to be free from any liability that might result from trial. Thus, for example, it is well-settled that the Double Jeopardy Clause secures not only a right against multiple prosecutions for the same offense but also against the possible result of those prosecutions, *i.e.*, multiple punishments for the same offense. *See, e.g.*, *United States* v. *Dixon*, 113 S. Ct. 2849, 2860 (1993) ("We have often noted that the [Double Jeopardy] Clause serves the function of preventing *both* successive punishment and successive prosecution") (emphasis added). Similarly, the Speech or Debate Clause protects against trial *and* liability. *Gravel* v. *United States*, 408 U.S. 606, 615 (1972) (accepting as "incontrovertible" the proposition that Clause "at the very least protects [a Senator] from criminal or civil liability and from questioning else-

[13] The fact that dismissal and waiver of damages were valued together demonstrates, as we explain below, that the right to be free from trial always vindicates other underlying interests; this Court has not, however, found that the existence of such other interests in tandem with the right to avoid trial defeats the opportunity for collateral review.

where than in the Senate"). And "[a] litigant who asserts an immunity from suit is asserting two rights: first, a right to be free of litigation; second, a right to be free of any need to pay damages." *Securities and Exchange Commission* v. *Quinn*, 997 F.2d 287, 290 (7th Cir. 1993). For each of these claims, this Court has found that the existence of the right not to be tried, in tandem with other interests, permitted collateral review, for it was that right that could not be adequately vindicated on review after final judgment. *See Mitchell* v. *Forsyth*, *supra*; *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); *Abney* v. *United States*, 431 U.S. 651 (1977).

Respondent's reliance on *Lauro Lines* and *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1989), Resp. Br. 35 36. 38-39, is seriously misplaced. In *Lauro Lines*, this Court drew the critical distinction repeatedly ignored by Desktop between an entitlement to avoid suit altogether and an entitlement to be sued only in a particular forum. While the latter right is "adequately vindicable" after trial, 490 U.S. at 501, by reversing a judgment and ordering that the trial occur in the proper forum, the former right is completely destroyed once the trial occurs. This case, as we have explained, falls in the former category.

The decision in *Van Cauwenberghe* rested on the conclusion that "the right not to be burdened with a civil trial itself is not an essential aspect of" the protection afforded by the principle of specialty. 486 U.S. at 525. That conclusion, in turn, was based on an examination of the nature of the right asserted. Because the principle of specialty "fundamentally bears on treaty obligations between states," the conduct of a private civil trial does not significantly implicate the interests served by the doctrine. *Id.* As the Court explained, the "mere conduct of a private civil trial" would not be viewed as a violation of the rights secured by the principle of specialty. *Id. See also id.* at 526 ("a right not to stand trial in a civil suit is not an essential aspect of a claim

of immunity under the principle of specialty"). For the reasons explained above, the right to avoid trial is the primary interest to be vindicated here.

IV. DIGITAL WAS NOT REQUIRED TO PROCEED UNDER SECTION 1292 TO PERFECT ITS APPEAL UNDER SECTION 1291 AND THE COLLATERAL ORDER DOCTRINE

Desktop erroneously suggests that the collateral order doctrine should be unavailable because the procedure of 28 U.S.C. § 1292(b) "provide[s] [an] adequate avenue[] for appellate review where the need is pressing." Resp. Br. 26. Section 1292(b) provides neither a necessary prerequisite nor an adequate alternative to appeal under *Cohen*.

Because an appeal under the *Cohen* doctrine is an appeal as of right under Section 1291, Section 1292(b) is arguably wholly unavailable where the collateral order doctrine permits appeal. *See* 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.22[2], at 267 (Section 1292(b) certification "does not apply to orders that do not determine the entire litigation but that are nevertheless 'final' for purposes of appealability by virtue of * * * the *Cohen* rule * * *"). This case, of course, presents no occasion for the Court to determine whether Section 1292(b) certification is *unavailable* where *Cohen* applies; it is enough for present purposes that a request for certification is *unnecessary* to a *Cohen* appeal. As we explained in our opening brief, Pet. Br. 30-31 n.14, that much is settled, and Desktop has identified no case holding to the contrary.

Thus, Digital's decision to pursue an appeal under the *Cohen* doctrine rather than the doubly-discretionary certification route of Section 1292(b) was far from "inexplicabl[e]," Resp. Br. 13, but was a reasonable decision grounded in well-settled law. It was established as Digital perfected its appeal to the Tenth Circuit that the court—like other courts—viewed appeal under the *Cohen*

doctrine and appeal under Section 1292(b) as separate routes to appeal.[14] Under all of the reported cases decided up to that time—*Grillet*, *Forbus*, and *Janneh*—Digital was entitled to appeal as of right under Section 1291 and the *Cohen* doctrine. In these circumstances, there should be no mystery as to why it chose that route and did not seek certification under Section 1292(b).

It is not at all clear, moreover, that the unnecessary certification was even available in the circumstances of this case. A prerequisite to appeal under Section 1292(b) is a determination by the district court that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion." This requirement mandates that "the order involve a clear-cut question of law against a background of determined and immutable facts." *Moore's*, *supra*, ¶ 110.22[2], at 275. Thus, courts have determined that certification is generally not available where the issue is essentially a factual one.[15] Here, the district court had disposed of the issues before it in one sentence of its order. It offered no legal analysis, holding only that "a fact finder could determine that defendant failed to disclose material facts to plaintiff during settlement negotiations which would have resulted in rejection of the settlement offer by the plaintiff." Pet. App. 13a. It was unlikely that the district court would find this determination, bound up in the factual allegations presented to it, to have satisfied the statutory pre-

[14] The Tenth Circuit has long characterized Section 1292(b) and *Cohen* as alternative means of appeal. *See, e.g., Kearns* v. *Shillinger*, 823 F.2d 399, 400-401 (10th Cir. 1987); *Hellerstein* v. *Mr. Steak, Inc.*, 531 F.2d 470, 472 (10th Cir.), *cert. denied*, 429 U.S. 823 (1976).

[15] *See, e.g., Clark-Dietz & Assocs.* v. *Basic Construction Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (declining to accept appeal because questions raised "appear to be merely fact-review questions inappropriate for § 1292(b) review"); *Department of Economic Development* v. *Arthur Andersen & Co.*, 683 F. Supp. 1463, 1487 (S.D.N.Y. 1988) (refusing to certify "fact-dependent" issue for appeal).

requisite to certification under Section 1292(b). Thus, pursuit of the certification route cited by Desktop was not only unnecessary to Digital's appeal, but also was likely to be futile as a practical matter.[16]

CONCLUSION

For the foregoing reasons, and those in petitioner's opening brief, this Court should reverse the decision below.

Respectfully submitted,

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[16] Moving for certification when a *Cohen* appeal is available is not only wholly unnecessary and perhaps inappropriate in the circumstances of an individual case but is also fraught with strategic risks. One circuit has held that a motion requesting a district court to amend an order to include a certification under Section 1292(b) "indicates that defendants considered certification a prerequisite to appealability" and cited that fact against the putative appellants. *Chicago Housing Tenants Organization, Inc.* v. *Chicago Housing Auth.*, 512 F.2d 19, 21-22 (7th Cir. 1975).